IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 14.03.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

S.A.No.737 of 1997

Vaithiyanathan .. Appellant/Defendant

Vs.

Kalavathi .. Respondent/Plaintiff

Prayer: This second appeal has been preferred against the decree and Judgment dated 26.3.1996 passed by the Additional Subordinate Judge, Mayiladuthurai, in A.S.No.2 of 1995, which was filed against the decree and judgment dated 27.7.1994 in O.S.No.363 of 1994 on the file of the District Munsif, Mayiladuthurai.

For Appellant : Mr.R.Gopalakrishnan

For Respondent : A.Muthukumar

JUDGMENT

This appeal has been preferred against the decree and judgment in A.S.No.2 of 1995 on the file of the Court of Additional Subordinate Judge, Mayiladuthurai. The plaintiff in O.S.No.363/1984 on the file of the District Munsif, Mayiladuthurai, had filed the suit for specific performance of a contract on the basis of an agreement dated 13.5.1980 entered into between the plaintiff and the defendant, who is none other than the brother of the plaintiff. The trial Court has granted only the alternative relief of payment of Rs.1,300/-. Aggrieved by the findings of the learned trial Judge, the plaintiff has preferred an appeal in A.S.No.2/1995 on the ground that the trial Court instead of granting a decree for specific performance, has granted the alternative relief of money decree ie. return of Rs.1,300/-. The first appellate Court has allowed the appeal thereby granting a decree for specific performance as prayed for in the plaint. Hence, the second appeal by the defendant.

2. The averments in the plaint relevant for the purpose of deciding this appeal in brief are as follows:-

2(a) The plaintiff is the sister of the defendant. Since the defendant needed money for his agricultural operations, the plaintiff raised a loan from State Bank of India, Mayiladuthurai branch in the year

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1976 and paid Rs.700/- to the defendant. The defendant undertook to clear off the loan due to the State Bank of India, Mayiladuthurai Branch, but as agreed he failed to discharge the loan to the bank. Due to the pressure from the bank, the plaintiff cleared off the loan amount. On 13.5.1980 the defendant executed an agreement infavour of the plaintiff to discharge the loan amount paid by the plaintiff amounting to Rs.1000/- within a period of two years and if he fails to repay the said loan within two years he undertook to convey the plaint schedule property by executing a sale deed in favour of the plaintiff.

2(b) The plaintiff discharged the entire amount with interest to the bank which come to Rs.1,300/-. The plaintiff has issued notice on 2.2.1984 to the defendant demanding the defendant to execute the sale deed in terms of the agreement dated 13.5.1980. The defendant has not chosen to sent any reply. Hence, the suit for specific performance of the contract on the basis of the sale agreement dated 13.5.1980 or for an alternative relief for a decree for Rs.1,300/- with interest.

3 The defendant in his written statement would contend as follows:-

3(a) The agreement dated 13.5.1980 is not true and valid and the same was not supported by consideration. The plaintiff has not raised any loan from the State Bank of India, Mayiladuthurai branch, and paid to the defendant. There was no necessity for the defendant to borrow a loan from the plaintiff. The defendant's father one Chinapillai was holding some lands at Ananthagudi Village. The defendant has in or about 1968 paid an amount of Rs.400/- to his father Chinnapillai to meet his cultivation expenses. His father promised him to return the money to him within a period of one year. But he did not keep up his promise instead he had given a land of 8 cents to the defendant to be enjoyed by him absolutely in the year 1969. Ever since the defendant is in enjoyment of the said piece of land which is described as the suit property.

3(b) in the year 1980 the defendant was demanding his father to make a settlement of his remaining lands. It appears that the defendant's father his brother Kannaiyan Pillai and his sister viz. the plaintiff have convened together to get back the suit property from the defendant. The defendant's father Chinapillai and the plaintiff along with the witness in the document dated 13.5.1980 represented to the defendant that his father was making a settlement of half of his remaining land to the defendant and also stated that his father will affix his thumb impression only if the defendant sign in that document. The defendant who knows only to sign his name had affixed his signature without knowing the contents therein. The document was kept with the defendant's father and understood to have been given to the plaintiff. Now the plaintiff wants to take advantage of the concocted document after a long period and filed this suit.

3(c) The plaintiff has not raised any loan from the Bank for the purpose of lending money to the defendant. If at all the plaintiff obtained any loan from the Bank it should have been only for her personal benefit and not for the defendant. Since the plaintiff could not

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understand the contents in the notice, he has not chosen to send any reply. Hence, the suit is liable to be dismissed.

4. On the above pleading the trial court has framed three issues for trial. On the side of the plaintiff P.W.1 and P.W.2 were examined and Ex.A.1 to A.9 were marked. The defendant has examined himself as D.W.1. No documentary evidence was let in on behalf of the defendant. After going through the oral and documentary evidence adduced by both parties before the trial Court, the learned trial Judge has come to a conclusion that the plaintiff is entitled to the alternative prayer asked for in the plaint and accordingly decreed the suit for Rs.1,300/- with interest and costs thereby dismissing the prayer for specific performance. Aggrieved by the findings of the learned trial Judge, the plaintiff has preferred an appeal in A.S.No.2 of 1995 before the Additional Subordinate Judge, Mayiladuthurai. The learned first appellate Court after giving due deliberation to the rival submissions of the parties concerned has allowed the appeal thereby granting the relief of specific performance of contract on the basis of Ex.A.1, agreement dated 13.5.1980. Hence, the second appeal by the defendant.

5. The substantial questions of law involved in this second appeal are as follows:-

> "a) Whether the respondent is an aggrieved person to file the first appeal before the Lower Appellate Court when she had accepted the alternative relief of the suit?
>
> b) The Lower Appellate Court has not committed an error of law allowing the appeal when the sale agreement was disputed by the appellant?"

6. The points:-

6(a) The trial judge has granted the alternative relief only on the ground that in the cross-examination P.W.1 has deposed that she will be satisfied with a decree for money due to her. The learned counsel appearing for the appellant relied on 2003(3) MLJ 199 (SC) (Boramma Vs. Krishna Gowda and others), and contended that while appriciating the evidence, the Court cannot take an answer from the cross-examination of a witness in isolation and arrive at a conclusion drawing an inference from the same. The short facts in the above cited dictum runs as follows:-

> "An agricultural land measuring 2 acres, 20 guntas of Survey No.56/7 situated at Kuruvanka village, Channarayapatna Taluk, Hasan District (referred to in the judgment as the suit property) belonged to respondents Nos.1 and 2, who were minors and under the guardianship of respondent No.3. On 30th November, 1970, respondent No.3, as guardian of respondents 1 and 2, sold the suit property in favour of the appellant and, in turn, the appellant executed an agreement for sale (reconveyance deed) in favour of respondents 1 and 2. Alleging that they have been ready and willing to perform their part of contract but the

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appellant was not willing to re-convey the property in their favour, the respondents filed the suit, O.S.No.32 of 1973, in the Court of Munsif, Channarayapatna in 1973. The appellant contested the suit inter alia, on the grounds. (1) that the agreement(Ex.P.1) was not executed by him and (2) that the plaintiffs have not been ready and willing to perform their part of the contract and there is no averment to that effect in the plaint.

After the trial , the trial Court dismissed the suit. The first appellate Court confirmed the findings of the trial Court. Hence, the second appeal was preferred by the plaintiff before the High Court of Karnataka. The High Court of Karnataka has allowed the second appeal on the ground that the respondents have complied with the requirements of Section 16(c) of the Specific Relief Act, thereby setting aside the concurrent judgments of the courts below and decreed the suit filed by the plaintiff. Hence, the appeal was preferred by the defendant before the Honourable Apex Court. While disposing of the appeal the Honourable Apex Court has held as follows:-

> "There is yet another sentence to which great importance is attached by the learned counsel to contend that the respondents have not been ready after the filing of the suit and it reads. "I am unable to deposit the amount". In our view it will not be a sound rule of appreciation of evidence to pick up an answer from the cross-examination of a witness and draw inference taking it in consistent the testimony of the witness is and as to how that answer fits in with the rest of the evidence and probabilities of the case."

The above said dictum exactly agrees with the facts of the present case. The trial Court relying on the evidence of P.W.1 in the cross-examination that she will be satisfied with a decree for money, has decreed the suit for money, alternative prayer, thereby rejecting the relief of specific performance of contract. The said findings was rightly set aside by the first appellate Court taking into consideration the other evidence available on record.

6(b) The main consideration is whether Ex.A.1 is an agreement of sale or merely a receipt for the payment made by the plaintiff. If Ex.A.1 is construed to be a mere receipt for the payment of money arranged by the plaintiff to the defendant then there is no need for including a schedule of property to Ex.A.1. The learned counsel for the appellant would contend that there is no period stipulated under Ex.A.1 to perform the contract and there is no sale price fixed for the property agreed to be sold under Ex.A.1 and that Section 16(c) of the Specific Relief Act is not attracted in this case to show that the plaintiff was always ready and willing to perform her part of the contract. But a reading of Ex.A.1 will

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go to show that already the plaintiff had moved the State Bank of India to obtain a loan for the defendant who is none other than her brother to meet the expenses incurred in his agricultural operations. The principle amount borrowed by the plaintiff is only Rs.700/- from the State Bank of India. The defendant has failed to discharge the said loan inclusive of interest, amount due to the bank on the date of Ex.A.1 which comes to Rs.1000/- and under Ex.A.1 the defendant has agreed to repay the said loan of Rs.1000/-, which was discharged by the plaintiff under Ex.A.4 to A.9 and if he fails to discharge the said loan of Rs.1000/-, he had agreed to sell the property schedule to Ex.A.1 in favour of the plaintiff by purchasing the stamp paper for executing a sale deed. The exact recital in Ex.A.1 in Tamil runs as follows:-

"மேற்படி பாங்கில் நாளதுவரையிலுள்ள அசல்வட்டி பாக்கி ஏற்படும் தொகை பூராவும் என்னுடைய பொருப்பில் நான் கட்டுவேனாகவும் அப்படி மேற்படி 2 வருட கெடுவில் மேற்படி தொகை எனக்கு ச சொந்தமான சொத்தை என்னுடைய சொந்தசிலவில் சர்க்கார் முத்திரைத்தாள் வாங்கி அடியில்கண்ட சொத்தை தங்கள் பெயருக்கு கிரயசாஸனம் எழுதிக்கொடுத்து ரிஜிஸ்தார் செய்து கொடுப்பேனாகவும் இந்தப்படி சம்மதித்து இந்த பத்திரம் தங்களுக்கு எழுதிக்கொடுத்தேன"

The defendant has signed in Ex.A.1 and his father has also affixed his left hand thumb impression. Ex.A.1 is infavour of the plaintiff. The defendant would admit the execution of Ex.A.1 infavour of the plaintiff. He would depose that at the time when he asked his father to provide land for constructing his house there arose a quarrel and only in that context Ex.A.1 came into existence under extraneous circumstance. Apart from D.W.1 there was no witness examined on the side of the defendant. On the other hand defendant's father has himself affixed his left thumb impression in Ex.A.1. The plaintiff has issued Ex.A.2-notice which was received by the defendant under Ex.A.3-acknowledgment. In Ex.A.2-notice also the plaintiff has asked the defendant to execute the sale deed in terms of Ex.A.1. But the defendant has not chosen to send any reply to Ex.A.2-notice. So taking into consideration the cumulative effect of the oral and documentary evidence let in by the parties it cannot be denied that the defendant had agreed to sell the property scheduled to Ex.A.1 under Ex.A.1. Under such circumstances, I do not find any reason to interfere with the findings of the learned first appellate Court in decreeing the suit for specific performance of contract which do not warrant any interference from this Court. Points are answered accordingly.

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7. In the result, the appeal is dismissed confirming the decree and judgment in A.S.No.2 of 1995 on the file of the Court of Additional Subordinate Judge, Mayiladuthurai. Considering the close relationship between the parties there is no order as to costs.

ssv

Sd/
Asst. Registrar

/true copy/

Sub Asst.Registrar

To,
1. The Additional Subordinate Judge, Mayiladuthurai.
2. The District Munsif, Mayiladuthurai.
+ One cc to Mr. R Thirugnanam Advocate SR. No. 16221
+ One cc to Mr. A. Muthukumar Advocate SR.No. 16156
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